Supreme Court, U.S.
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No. 91-1435

In the
Supreme Court of the United States
October Term, 1991

MARC RICH,

Petitioner,

—v.—

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the Court review the question whether a United States citizen who takes an oath of renunciation while swearing allegiance to a foreign nation has, by virtue of these acts alone, relinquished his United States citizenship without regard to the citizen's specific intent to do so, where the Court decided this question twelve years ago in *Vance v. Terrazas*, 444 U.S. 252 (1980), and held that citizenship may be lost only if the trier of fact concludes that the citizen voluntarily committed an expatriating act with the specific intent to relinquish his citizenship?

2. Should the Court review this case in order to change existing law and establish one test for determining loss of citizenship for expatriation proceedings and a different test for determining citizenship for the purposes of diversity jurisdiction, where an unambiguous statute provides for a uniform rule?

3. Should the Court review the question whether a dual citizen of the United States and Spain should be treated as an American citizen for purposes of diversity jurisdiction, where the issue arises at best infrequently and the principal ground urged as the basis for review was not presented to the District Court or the Court of Appeals?

STATEMENT PURSUANT TO RULE 29.1

Respondents Action S.A. and Deltamar Establishment state that they have no parent companies and also have no subsidiaries that are not wholly owned.

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COUNTERSTATEMENT OF THE CASE

I.

This case is of little if any importance to anyone except the parties. The decision of the Court of Appeals does not resolve important questions of law that recur with any frequency. This is a case decided on its particular facts under well-settled law.

In short, the petition does not present any issues worthy of the Court's review. The Court should deny the petition.

II.

This action was commenced in 1983 by Action S.A. and Deltamar Establishment, two foreign corporations, against Marc Rich and Marc Rich & Co., Inc., for fraud, breach of fiduciary duty, breach of contract and unjust enrichment arising from a contract for the sale of rice. Plaintiff Action S.A. is a French corporation with offices in Paris. Plaintiff Deltamar Establishment is a Liechtenstein corporation with offices in Vaduz. Both plaintiffs trade in rice and other commodities. (Pet. 39a-40a.)[1/]

Petitioner Marc Rich became a naturalized United States citizen in 1947; at the time the action was commenced, he resided in New York City. Marc Rich & Co., Inc., which Rich controls, is a New York corporation with its principal place of business in New York City. (Pet. 39a–40a.) Federal jurisdiction over this action is based on diversity. (Pet. 39a–40a.)

Rich did not answer the complaint. Instead, after plaintiff moved for a default judgment, Rich entered a limited appearance opposing the default on the ground that the District Court lacked subject matter jurisdiction. Rich alleged that he had obtained Spanish citizenship in 1982 and had renounced his United States citizenship at that time. On the basis of this claim, Rich argued that complete diversity between the parties was lacking. (A. 634–35; 2826.)

The District Court held an evidentiary hearing to determine Rich's citizenship. The court applied the well-settled law governing the effectiveness of an alleged renunciation of citizenship, as announced by the Court in *Vance v. Terrazas*, 444 U.S. 252 (1980). In *Terrazas*, the Court held that an expatriating act results in the loss of citizenship only if the act is performed voluntarily and with the specific intent to relinquish citizenship. 444 U.S. 258-61.

[1/] Reference to "Pet. ___" are to Rich's Petition for a Writ of *Certiorari*. References to "A. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

On the basis of the full factual record developed at the evidentiary hearing, the District Court found that Rich had not relinquished his American citizenship and that he was a United States citizen at the time this action was commenced against him in 1983. (Pet. 12a-30a.) Accordingly, the court granted plaintiffs' motion for a default judgment and, after an inquest on damages, entered judgment for the plaintiffs for $6,306,714.51, including compensatory damages, prejudgment interest and punitive damages. (A. 2526a-e.) The Court of Appeals agreed with the District Court's decision on the questions of citizenship, jurisdiction, Rich's default and compensatory damages; disagreed with the District Court's method of calculating prejudgment interest; and remanded for recalculation of prejudgment interest and punitive damages.[2/] (Pet. 1a-9a.)

III.

The questions presented in this petition are not novel or important or worthy of the Court's review for any other reason. The decision that Rich did not relinquish his United States citizenship prior to the time this action was commenced was based on a fact-intensive determination of no broad significance. Moreover, the question was correctly decided under clear legal standards announced by the Court. Rich's view that a citizen's execution of an oath of renunciation of United States citizenship establishes conclusively the person's specific intent to relinquish United States citizenship conflicts squarely with the Court's decision in *Vance v. Terrazas*, 444 U.S. 252 (1980), which rejected this precise claim. There is no reason to review this question anew.

A second issue raised by the petition—whether, assuming that Rich was a dual national, his American citizenship controls for purposes of diversity jurisdiction—was also correctly decided in accordance with precedent. Moreover, the arguments advanced by

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[2/] On remand, the District Court recalculated prejudgment interest, reducing the amount from $4,110,254.25 to $1,694,080.05, and increased the award of punitive damages from $500,000.00 to $1,500,000.00. *Action S.A.* v. *Marc Rich & Co.*, 1992 U.S. Dist. Lexis 1874, 1992 WL 36138 (S.D.N.Y. Feb. 14, 1992).

Rich in the petition urging review of this question were not presented either to the District Court or the Court of Appeals. Finally, the decision presents no conflict with decisions of this or other federal courts.

REASONS FOR DENYING THE WRIT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

The Standard for Renunciation of Citizenship is Well-Settled and Unambiguous

The law governing the renunciation of United States citizenship is well-settled.

As the party alleging loss of citizenship, Rich was required to provide evidence establishing that loss. The law is unambiguous:

> *Whenever* the loss of United States nationality is put in issue in *any* action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter *or any other Act*, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.

8 U.S.C. § 1481(b) (1988) (emphasis supplied).[3/]

The Court has recently and definitively interpreted this statutory provision and has held that, for an alleged renunciation of citizenship to be effective, "the trier of fact must in the end

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[3/] In 1986, 8 U.S.C. § 1481(c) was redesignated 8 U.S.C. § 1481(b), and its language was amended in a manner not relevant to this proceeding. Pub. L. No. 99-653, § 19, 100 Stat. 3568 (1986), *as amended by* Pub. L. No. 100-525, § 8(n), 102 Stat. 2618 (1988). Although Rich cites to 8 U.S.C. § 1481(c) throughout his petition, respondents employ the provision's current citation.

conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." *Vance* v. *Terrazas*, 444 U.S. at 261. Moreover, an expatriating act results in loss of citizenship only if performed with the specific intent to relinquish citizenship. *Vance v. Terrazas*, 444 U.S. at 258-61. Specific intent may be "expressed in words or . . . found as a fair inference from proved conduct." 444 U.S. at 260; *accord Sadat v. Mertes*, 615 F.2d 1176, 1181 (7th Cir. 1980) (*per curiam*). Consequently, "the question whether citizenship has been voluntarily relinquished is to be determined on the facts of each case. . . ." *Vance v. Terrazas*, 444 U.S. at 266.

The District Court and the Court of Appeals did not depart from these well-settled and straightforward principles of law. The fact that Rich swore an oath of renunciation to obtain Spanish citizenship did not conclusively establish the loss of his United States citizenship. Indeed, the argument repeatedly pressed by Rich below and here—that the mere commission of an expatriating act specified in the statute, without more, is conclusive evidence of relinquishment of citizenship—was directly addressed and rejected by the Court in *Terrazas*. There, a United States citizen declared allegiance to a foreign state and "expressly renounc[ed] United States citizenship. . . ." 444 U.S. at 255. The government argued, as Rich does here, that the renunciation of United States citizenship coupled with swearing allegiance to a foreign power is "so contrary to undivided allegiance to this country that it could result in loss of citizenship without regard to the intent of the actor. . . ." 444 U.S. at 261. The Court held:

> [W]e are confident that it would be inconsistent with [prior law] to treat the expatriating acts specified in [8 U.S.C.] § 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen.

444 U.S. at 261.

In so holding, *Terrazas* squarely rejected the argument that the mere commission of an expatriating act is enough to destroy

citizenship. To determine the question, the trial court must examine all of the circumstances to determine the actor's intent. 444 U.S. at 266.

The courts below properly concluded that the citizen in this particular case did not intend to relinquish his citizenship. The record showed that for nearly four decades following Rich's naturalization in 1947, he enjoyed the benefits of citizenship in this country. In 1982, Rich learned that he had become a target of a criminal investigation by the United States Government; he immediately sought to obtain a foreign passport to facilitate his flight in case of indictment.[4] By the summer of 1982, Rich had acquired a Spanish passport for just such a contingency. (A. 885-89.) To obtain it, Rich mouthed ritualistic words of loyalty to Spain, but in doing so, he did not intend to renounce his United States citizenship. At best, Rich tried to play a shell game in which he could claim United States citizenship as necessary to protect himself against criminal prosecution or to facilitate his own business and financial interests. Time and again, after the summer of 1982 Rich declared by word and conduct that he *was* a United States citizen. (*See, e.g.*, Pet. 3a-5a; 14a-30a; A. 640-48; 705; 1007 at ¶ 7; 1237 at ¶ 6.)

Thus, in Swiss litigation, which Rich himself instituted in May 1983, seeking an order compelling a Swiss company of which he was a director to produce documents to the United States grand jury, Rich claimed he was a United States citizen to advance his cause. (Pet. 3a; 17a-20a; A. 640-48; 685 at ¶ 2; 695-703.) Further, throughout 1983—indeed, until the spring of 1985—Rich held himself out to the business community in Switzerland as a United States citizen by listing himself as such in the Commercial Register of Zug. (Pet. 4a; 22a-23a; A. 705; 1007 at ¶ 7; 1237 at ¶ 6.) Moreover, between the summers of 1982 and 1983, Rich claimed United States citizenship by entering this country on a

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[4] On September 19, 1983, a grand jury sitting in the United States District Court for the Southern District of New York returned a 51-count indictment against Rich charging him with numerous violations of federal law. (A. 2745-2800.) Rich is a fugitive from this indictment. (A. 636-39 at ¶¶ 7-8; 1045; 2854.)

United States passport and not as an alien. (Pet. 3a; 20a-22a; A. 727-28; 733-37; 1015-43; 1022-23.) And finally, Rich failed in the spring of 1983 to respond to an inquiry from the United States Embassy in Madrid in regard to his citizenship. (Pet. 3a; 16a-17a; 52a-65a.) Rich delayed acknowledging a renunciation of his United States citizenship until November, 1984 (Pet. 66a-71a), supporting the District Court's finding that "Rich intended to defer making his renunciation of U.S. citizenship to the U.S. government—all with a view of continuing U.S. citizenship as long as it suited his various purposes." (Pet. 20a.)

In sum, there was ample evidence from which the District Court and the Court of Appeals could conclude that in 1982, when Rich acquired Spanish citizenship, he did not intend to renounce his American citizenship. This factual determination, which was correctly made and is of little interest to anyone other than the parties, does not warrant attention by the Court.

The Court of Appeals Did Not Misapply the Rule Requiring a Showing of Specific Intent to Relinquish Citizenship to this Diversity Action.

Rich claims that the expatriation statute and the requirement set forth in *Terrazas* that specific intent to relinquish United States citizenship be shown before citizenship is lost apply only in expatriation proceedings, not in challenges to diversity jurisdiction. (Pet. 12-17.) This argument is groundless.

The plain language of the statute makes it applicable "[w]henever the loss of United States nationality is put in issue in any action or proceeding commenced . . . under, or by virtue of, the provisions of this chapter or any other Act. . . ." 8 U.S.C. § 1481(b) (1988). Thus, by its terms, the statute applies to diversity cases in which loss of citizenship is made an issue. In view of the lack of ambiguity, there is no reason to treat this as the extraordinary case that requires consideration of the drafters' intent. *Connecticut Nat'l Bank v. Germain*, 60 U.S.L.W. 4222, 4223 (U.S. Mar. 9, 1992). Even so, the legislative history of the

expatriation statute does not support Rich's contention that the statute, and by implication, the decision in *Terrazas*, were intended to apply only to proceedings to determine citizenship for purposes of expatriation. Nowhere does the legislative history state that the statutory provisions do not apply to cases in which citizenship must be determined for purposes of diversity jurisdiction.

Rich's cry that the decision of the Court of Appeals, if unreversed, will increase the caseload of federal courts by "sweeping" into the federal system numerous commercial disputes between aliens and ex-citizens, is a false alarm. There is no reason to believe that there is a large pool of alien claimants waiting to sue ex-citizens in federal court. In any event, the decision of the Court of Appeals has nothing to do with *ex*-citizens; at the time plaintiffs sued Rich he was still a United States citizen.

Rich's other professed concerns for the administration of justice in the federal courts are equally exaggerated. Foreign governments are not likely to be offended by the Court of Appeals' ruling, which does not change existing law. Because the United States recognizes dual nationality, *Perkins v. Elg*, 307 U.S. 325, 329 (1939), Spain could determine that Rich had become a Spanish national in 1982, and a court in the United States could still determine, as it did here, that, as of August 1983, Rich did not do everything necessary to renounce his United States citizenship. As a dual national, if Rich was one, the District Court still had subject matter jurisdiction over the action because dual citizens are regarded as United States citizens for purposes of diversity. *Sadat v. Mertes*, 615 F.2d at 1187.

Rich claims that this rule of law should be reconsidered by the Court because the treatment of individual dual nationals for purposes of determining citizenship under the diversity statute, 28 U.S.C. § 1332(a) (1988), conflicts with the way in which the citizenship of corporations, partnerships and unincorporated associations with multiple citizenship are determined for diversity purposes. However, Rich never made this argument in the lower courts and he is foreclosed from presenting it to this Court in the first instance. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362

(1981). Moreover, individuals are treated differently from business entities under American law for many purposes. That this is so in determining citizenship for purposes of diversity jurisdiction does not make the question worthy of review.

The Decision Of The Court Of Appeals Does Not Conflict With The Decisions Of Any Court Of Appeals On The Same Matter

Finally, Rich argues that the decision of the Court of Appeals conflicts with *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981) (*per curiam*), and *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985). These cases, however, in which courts found that loss of citizenship occurred, involve very different factual circumstances than those presented here.

In *Terrazas v. Haig*, the trial court found (and the Seventh Circuit affirmed) that Terrazas had intentionally relinquished his citizenship *not only* by swearing an oath of loyalty to Mexico and concurrently renouncing his allegiance to the United States, but also by his "course of conduct" afterward, in which he traveled to the United States on a Mexican passport, actively sought the issuance of a Certificate of Loss of United States Nationality, and sought to inform the United States draft board of his purported loss of citizenship. *Terrazas v. Vance*, 577 F.2d 7, 8-9 (7th Cir. 1978), *rev'd on other grounds*, 444 U.S. 252 (1980); *Terrazas v. Muskie*, 494 F. Supp. 1017, 1018-19 (N.D. Ill. 1980) (on remand from *Vance v. Terrazas*, 444 U.S. 252 (1980)), *aff'd sub nom. Terrazas v. Haig*, 653 F.2d 285, 288 (7th Cir. 1981) (*per curiam*). In *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985), the Circuit Court determined that Richards lost his citizenship when he took an oath of loyalty to Canada, which included a renunciation of United States citizenship, *and* where he took no action afterward inconsistent with an intent to renounce. The Ninth Circuit explained that "[w]e agree . . . that the voluntary taking of a formal oath that includes an exclusive renunciation of United States citizenship is *ordinarily* sufficient to establish a specific intent to renounce United States citizenship. We also believe that there are no factors here that would justify a different result." 752 F.2d at 1421 (emphasis

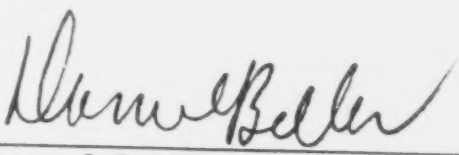
supplied). In contrast to these cases, Rich's repeated invocation of the benefits of United States citizenship after his alleged renunciation are factors that *do* justify a different result in this case.

Significantly, each of these cases shows that not only is there no conflict between the circuits on the law governing expatriation, but circuits are in agreement that the determination whether a person has expatriated himself turns on the facts of each particular case – not just on mouthing the words of renunciation. This consideration alone makes this case unworthy of review on *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
April 6, 1992



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